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Abstention

Puritan Lace Mfg. Co., Inc. v. Perfect Home L.L.C. (*In re* Perfect Home), 231 B.R. 358 (Bankr. N.D. Ala. Jan. 26, 1999): The Court exercised its discretion to abstain from hearing a related to proceeding that raised only state law issues of unsettled nature which had previously been decided adversely to the debtor. After the state court $1.5 million judgment was set and set for retrial, the debtor filed bankruptcy and removed the case to bankruptcy. The plaintiff filed a motion for abstention and remand. In the interest of justice and of comity with state courts, the Court determined that abstention over the proceeding was appropriate. Equitable grounds existed to require remand of the "related to" proceeding where the state court was more familiar with the case issues, the matter could be decided more expeditiously in state court and the removal appeared to be an instance of forum shopping.

Automatic Stay - § 362

Okwukwu v. Internal Revenue Service (*In re* Okwukwu), 210 B.R. 194 (Bankr. N.D. Ala. July 11, 1997): The IRS retained its pre-petition right to setoff debtor's pre-petition tax refund pursuant to § 553(a) where debtor filed his tax return claiming the refund post-petition. The substantive right to a tax refund arises at the end of the tax year to which the refund relates. A creditor's right of setoff is subject to the automatic stay provisions of § 362. The IRS setoff the debtor's tax refund without seeking relief from the stay and would have been liable for actual damages, including attorney fees, under § 362(h) if it had violated the stay with full notice of the debtor's bankruptcy filing. The address listed for the IRS in the debtor's petition was insufficient, however, to satisfy the due process requirements of Bankruptcy Rule 7004(4).

In re Madison Hotel Corp., 175 B.R. 94 (Bankr. N.D. Ala. Nov. 23, 1994): The Court modified the automatic stay to allow Chapter 11 mortgagee to foreclose upon debtor's hotel. The hotel was in danger of losing its franchise. The debtor was in default on its payments and had made no effort to cure the default. Further, the debtor had changed one of the hotel's load-bearing walls without the mortgagee's permission and in violation of the city's building code. The mortgagee was also entitled to the appointment of a Chapter 11 trustee to take possession and safeguard the hotel's property pending liquidation by the mortgagee. Serious questions were raised about the propriety of some of the debtor's post-petition financial transactions, including numerous short term loans between the debtor and the debtor's principals.

In re Toll, 175 B.R. 406 (Bankr. N.D. Ala. Sept. 23, 1994): An automatic stay violation by a vendor on a land sale contract warranted $10,000 in punitive damages, $5,000 in compensatory damages, and $650 in attorney fees. The debtors' Chapter 13 plan proposed to surrender their home to the vendor. The debtors had begun to remove their possessions, but continued to live in the house. While the debtors were away, the vendor removed the refrigerator, washer and dryer, a dresser, beds, and other household goods in which the vendor claimed a security interest. The vendor's actions were unscrupulous and vicious. The back door was damaged by forced entry. Perishable food items in the refrigerator were placed on top of the counter to ruin. In addition, one of the debtors stated that most of her clothes were in the dryer when it was taken, and she had been doing without them. Finally, the debtors were without beds and had to sleep on the floor, and were forced to make other eating arrangements because they did not have a refrigerator.

Avoidance - § 522(f)

In re Hillard, 198 B.R. 620 (Bankr. N.D. Ala. July 24, 1996): A creditor converted its purchase money security interest in the Chapter 7 debtors' household goods into a nonpurchase money security interest by refinancing the original loan. Because the resulting lien no longer qualified as purchase money, the debtors could avoid the lien pursuant to § 522(f) of the Code to the extent the lien impaired their exemption in household goods. The refinancing extended the payment terms, reduced the monthly payments, increased the interest rate, and increased the loan amount to pay the debtors' credit life insurance premium.

Patterson v. Spradlin (*In re* Patterson), 185 B.R. 354 (Bankr. N.D. Ala. Aug. 8, 1995): A creditor's failure to perfect a security interest in a debtor's vehicle entitled the Chapter 13 trustee to avoid the security interest. To perfect the security interest, the creditor should have had the certificate of title issued in the debtor's name with the creditor's status as the lienholder noted on the title. Instead, the creditor had the certificate of title changed to the creditor's name after the debtor's default.

Claims

In re Lee, 177 B.R. 715 (Bankr. N.D. Ala Feb. 14, 1995): A wholly unsecured mortgage on a Chapter 13 debtor's residence is not subject to the § 1322(b)(2) antimodification clause. In Nobelman v. American Sav. Bank, 508 U.S. 324, 113 S.Ct. 2106, 124 L.Ed.2d 228 (1993), the Supreme Court held that a Chapter 13 debtor with an outstanding mortgage balance that exceeded the value of the debtor's residence could not bifurcate the mortgage into secured and unsecured claims because §1322(b)(2) provides that a Chapter 13 plan may not modify a claim that is secured only by a security interest in real property that is the debtor's principal residence. However, in this case the Chapter 13 debtor objected to the secured claims of the third and forth mortgagees because the value of the debtor's principal residence was less than the balance owed on the first and second mortgages. The debtor argued that Nobelman was inapplicable. The court held that § 1322(b)(2)'s prohibition against the

modification of a principal residence mortgagee's rights does not apply unless a debtor has some equity in the residence to partially secure the claim. A mortgage is unsecured by definition where the value of the residence is less than the balance owed on prior mortgages.

Confirmation

In re Shirley, 2000 WL ----- (Bankr. N.D. Ala. Nov. 29, 2000): Creditor objected to confirmation on the ground that the debtor's plan could not be confirmed unless the debtor either accepted or rejected what the creditor characterized as a true lease between the parties. The parties had entered into an agreement for the lease of equipment and a separate agreement that gave the debtor the option to purchase the equipment at the end of the lease period. The creditor argued that the transaction created a true lease, and the debtor responded that the transaction was a security agreement disguised as a lease. The Court found that the transaction was in fact a security agreement covered by Article 9 of the Uniform Commercial Code. To determine whether the transaction was a true lease or a financing arrangement, the Court had to determine whether the lease contained a nominal purchase price. The option purchase price was 7% of the total lease payments or exactly 10% of the original purchase price. The Court found that the purchase price for the equipment was nominal and that the transaction was in the nature of a financing arrangement under Article 9 - Secured Transactions- of the Uniform Commercial Code.

In re Strickland, 181 B.R. 598 (Bankr. N.D. Ala. April 6, 1995): Nondischargeable student loan debts may not be treated more favorably than other unsecured claims for the first thirty-six months of a Chapter 13 plan. Thereafter, all payments under the plan may be devoted solely to payment of the student loan. This is because the disposable income test for Chapter 13 plan confirmation requires a debtor to pay all disposable income into the plan for only three years. At that point, unsecured creditors have received all they had a right to expect, with the remaining two years of payments representing a "good faith" effort by the debtor that is not required by the Bankruptcy Code.

In re Pruett, 178 B.R. 7 (Bankr. N.D. Ala. Feb. 23, 1995): Creditor objected to confirmation because debtor's plan did not provide for full payment of creditor's home mortgage. The debtor argued that § 1322(b)(2) does not prohibit the bifurcation of mortgage indebtedness where the claim is secured by the debtor's residence and other collateral. The Court determined that the debtor was entitled to bifurcate the mortgagee's claim and retain the original interest rate and payments called for by the original note for as long as necessary to fully pay the secured claim. However, if the debtor sought to change the interest rate and the amount of the monthly payments, the secured claim would have to be fully paid within the five year plan period.

In re Hardy Machinery, 1994 WL 722084 (Bankr. N.D. Ala. Dec. 16, 1994): The Chapter 11 debtor's proposal to abandon certain industrial equipment in full satisfaction of the debt owed to its secured creditor failed to satisfy the "indubitable equivalent" requirement of 11 U.S.C. § 1129(b)(2)(A)(iii) where the fair market value of the equipment was less than the amount of the indebtedness owed to the creditor. Thus, the debtor was not allowed to "cram down" its plan over the objections of the secured creditor.

In re Rice, 171 B.R. 399 (Bankr. N.D. Ala. Aug. 19, 1994): Debtor's proposed Chapter 12 plan consisting of a 15 year term for repayment of a bank's claim secured by the debtor's poultry houses which had an average life expectancy of ten years was not acceptable. Moreover, the payment of interest at 8 1/4% over the 15 year period was inadequate because the current lending rate was at least 9 1/4%, the collateral was of a depreciable nature, and the debtor was in poor health.

Commencement of Case

***In re* McMeans, 209 B.R. 253 (Bankr. N.D. Ala. June 10, 1997):** Debtor's petition was filed for purposes of determining the commencement of the debtor's bankruptcy case when stamped "filed" by the bankruptcy clerk, not upon its transmission to the clerk's office by facsimile. The use of a facsimile machine is merely a means by which to transmit material to the clerk's office for filing and not an end in and of itself of filing. Accordingly, although the debtor's petition was received by the clerk at 10:46 a.m., it was not actually filed until 11:27 a.m. when the clerk stamped it "filed." Thus, a foreclosure sale that concluded at 11:10 a.m. took place prior to the commencement of the case.

Discharge - § 727

Huntington Center Partners, Ltd. v. Dupree (*In re* Dupree), 197 B.R. 928 (Bankr. N.D. Ala. July 11, 1996): Chapter 7 debtor's discharge was denied pursuant to § 727(a)(4)(A) where the debtor intentionally made numerous false oaths in or in connection with her bankruptcy case. The debtor failed to disclose the sale of substantially all inventory in her video rental store for $30,000. The debtor also failed to disclose a business checking account, even though the only debt to be discharged arose from the video rental store, a loan to her sister, and her repayment of a loan from a family member. Moreover, the debtor inaccurately listed her cash on hand or the balance in her bank accounts.

Dana Fed. Credit Union v. Holt (*In re* Holt), 190 B.R. 935 (Bankr. N.D. Ala. Jan. 9, 1996): Debtor's Chapter 7 discharge was denied under § 727(a)(4)(A) for false oaths. The

debtor inaccurately listed the value of his cash, checking and savings account balances in his petition. At trial, the debtor testified that he deposited an undisclosed $4,500 into his checking account. The evidence proved, however, that the debtor actually deposited the money into two separate accounts only one month prior to filing his petition. The timing and amount of the deposit led the Court to question the veracity of the debtor's testimony. In addition to the debtor's failure to disclose the $4,500 deposit, the debtor also gave vague, non-responsive answers to questions concerning the disposition of a $9,162 severance check. Although the debtor testified as to how he spent his severance check, his answers varied, were vague and unresponsive, and the debtor lacked documentary support.

Behrman Chiropractic Clinics, Inc. v. Johnson (*In re* Johnson), 189 B.R. 985 (Bankr. N.D. Ala. Dec. 19, 1995): A Chapter 7 debtor-chiropractor's concealment of office and medical equipment, transfer of property with intent to defraud, and false oaths in connection with the transfer warranted a denial of the debtor's discharge. The debtor failed to list on his schedules certain property, neglected to disclose the transfer of X-ray equipment, failed to disclose in his schedules a $1,900 accounts receivable balance resulting from the sale of the X-ray equipment, and failed to disclose that he was holding a muscle stimulator and a computer system for third parties. The debtor claimed that, with respect to the last items, he had not listed them because they belonged to another doctor and to his sister. However, the debtor did not list them as being held by him on behalf of others and his testimony that the computer system belonged to his sister was not credible. The debtor also failed to adequately explain the diminution in value of the equipment from $8,000 to $708 in a five month period. Finally, the debtor employed an appraiser to value his office furniture and equipment in connection with the bankruptcy case, but he instructed the appraiser to disregard certain items that were located in the debtor's office at the time of the appraisal and that were included in the debtor's federal income tax returns. The debtor's conduct, at the very least, constituted a reckless disregard for the truth, sufficient to deny discharge.

Dischargeability - § 523

Taxes - § 523(a)(1)

Fretz v. United States (*In re* Fretz), 239 B.R. 605 (Bankr. N.D. Ala. Oct. 20, 1999), *aff'd*, CV-99-J-1447-NE (May 3, 2000): A debtor's intentional failure to file federal income tax returns, at a time when he knew that taxes were due and when he had sufficient funds to pay them, was not in the nature of a willful attempt to evade or defeat taxes, such as would serve to render the debtor's tax debt nondischargeable under § 11 U.S.C. § 523(a)(1)(C). The debtor did not attempt to hide or conceal any property, was not living a lavish lifestyle, and did not act with any dishonest or fraudulent intent. Rather, the debtor was simply indifferent to his tax obligations or financial affairs in general as a result of his alcoholism.

Burgess v. United States (*In re* Burgess), 199 B.R. 201 (Bankr. N.D. Ala. June 7,

1996): The United States failed to prove that Chapter 7 debtors filed a fraudulent tax return or willfully attempted to evade taxes within the meaning of § 523(a)(1)(C). Although the debtors under-reported their taxable income, there was no evidence that the debtors were aware of the accounting error that precipitated their debtors' tax problems. Moreover, the debtors did not fail to file tax returns nor did they repeatedly file late tax returns. Additionally, the debtors' did not fail to keep adequate tax records, attempt to conceal assets, nor refuse to cooperate with the IRS.

Fraud - § 523(a)(2)(A)

American Express Travel Related Servs. Co. v. McKinnon (*In re* McKinnon), 192 B.R. 768 (Bankr. N.D. Ala. Feb. 29, 1996): The Chapter 7 debtor incurred charges on her credit card in an effort to finance a business venture publishing a coffee table book on Russian aeronautics. The case of *Field v. Mans*, 116 S.Ct. 437 (1995), mandates the use of common law principles in the application of § 523(a)(2)(A). Thus, with regard to the element of intent to deceive, *Field* requires the application of the subjective standard of intent — whether the cardholder subjectively intended to deceive the issuer at the time the charges were incurred by examining all of the facts on a case by case basis. In the instant case, the creditor failed to prove that the debtor had a subjective intent to deceive at the time she incurred the obligations. The debtor intended to pay the debt by proceeds generated from the sale of the book, and honestly believed that the book would be successful.

Beshears v. Beshears, 173 B.R. 232 (Bankr. N.D. Ala. Sept. 9, 1994): A Chapter 7 debtor's former wife who had been granted a mortgage on the debtor's property under a divorce decree did not rely on the debtor's representations to a bank when the debtor granted the bank a first mortgage on the property. Therefore, the discharge exception for fraud did not apply to the debtor's mortgage obligation to his former wife. The debtor's dealings with the bank did not induce the former wife to rely on the debtor's actions, or to part with anything of value. Rather, the proximate cause of the former wife's damage was her own failure to properly record her mortgage.

Fraud or Defalcation in Fiduciary Capacity - § 523(a)(4)

United Food and Commercial Worker's Union Local 1995 v. Eldridge (*In re* Eldridge), 210 B.R. 188 (Bankr. N.D. Ala. June 26, 1997): The debtor was entitled to discharge a judgment for medical expenses paid on behalf of the debtor by his health benefit plan after the debtor entered into a settlement agreement with his tort-feasor, but failed to reimburse the plan as required by a subrogation agreement executed by the debtor. Neither the subrogation agreement nor the rules and regulations governing the plan were sufficient to create a fiduciary relationship between the parties within the meaning of § 523(a)(4) to exclude the debt for fraud or defalcation while acting in a fiduciary capacity. The traditional definition of 'fiduciary' is far

too broad for purposes of § 523(a)(4) which has been limited by federal courts to include express and technical trusts. The mere failure to perform in accordance with a contract will not render a debt nondischargeable on a fiduciary fraud theory under § 523(a)(4).

Alimony, Maintenance, or Support - § 523(a)(5)

Lanting v. Lanting, 198 B.R. 817 (Bankr. N.D. Ala. Aug. 2, 1996): The Court determined that an award of attorney fees in a final decree of divorce is nondischargeable as alimony, maintenance, or support where the decree contains an award of child support, alimony, or a combination thereof. Thus, the Chapter 7 debtor's obligation to pay an attorney fee award pursuant to the divorce decree was nondischargeable as support, even though the former spouse's income exceeded that of the debtor at the time of the divorce, and the former spouse was not awarded alimony because the award was intended as support as indicated in the divorce decree. Moreover, the divorce litigation involved the custody of minor children and child support.

Willful and Malicious Injury - § 523(a)(6)

Avco Fin. Servs., Inc. v. Alexander (*In re* Alexander), 201 B.R. 294, (Bankr. N.D. Ala. Oct. 10, 1996): Chapter 7 debtors willfully and maliciously converted an air conditioning unit subject to the creditor's purchase money security interest. Therefore, an amount equal to the value of the unit at the time of conversion was excepted from discharge pursuant to § 523(a)(6). Upon attempting to regain possession of its collateral, the creditor found that the unit had been replaced by a dilapidated unit of a different brand. The debtors' explanation for the loss was not credible. Moreover, a neighbor testified that the original unit remained on the debtors' property after the renters of the debtors vacated the premises, that the unit disappeared while the debtors were removing various items from the premises, and that a different unit appeared at the same time. Finally, the debtors knew that the terms of their retail installment contract required them to leave the collateral attached to their mobile home and that a breach of this requirement would injure the creditors' interest in the property.

Burgess v. Martin (*In re* Martin), 171 B.R. 395 (Bankr. N.D. Ala. Aug. 9, 1994): A judgment creditor, who brought a pre-petition state court malicious prosecution action against the Chapter 7 debtor, failed to establish a willful and malicious injury that would render the judgment nondischargeable. Collateral estoppel did not apply because the issue of malicious prosecution was not fully litigated in the state court which rendered a default judgment against the debtor. There were no specific findings of willful or malicious conduct by the state court, and there was no indication as to the basis of liability on which the judgment rested. Moreover, the creditor failed to establish that the acts of the debtor were willful, malicious, or intentional. The creditor testified that she was charged with criminal mischief by the debtor, that the debtor did not appear at the criminal trial, that the criminal case was dismissed, that she had never seen the debtor before in her life, that she was aware that her then-husband had apparently been

seeing the debtor, and that she did not slash the debtor's tires. The debtor, on the hand, testified that she witnessed the judgment creditor slashing her tires, and that she had never received service of the summons and complaint in the state court action.

American Gen. Fin. v. Taylor (*In re* Taylor), 187 B.R. 736 (Bankr. N.D. Ala. Oct. 19, 1995): A creditor failed to demonstrate that a Chapter 7 debtor knew or should have known that his actions in selling a dinette chair, which was subject to the creditor's purchase money security interest, would cause financial harm to the creditor. Therefore, the creditor failed to prove by a preponderance of evidence that the debtor acted maliciously in selling the chair to satisfy his rent obligation, and the dischargeability exception for willful and malicious injury was inapplicable. The debtor testified that, at the time he sold the chair, he fully intended to comply with the furniture payments when they became due. The debtor was involved in a divorce proceeding at that time and was merely attempting to rearrange his finances. The note was not in default at the time of the sale. The debtor did not file for bankruptcy until some nine months after selling the chair.

Student Loan - § 523(a)(8)

Singleton v. Chase Manhattan Bank (*In re* Singleton), 172 B.R. 994 (Bankr. N.D. Ala. Oct. 11, 1994): The repayment of student loans by Chapter 7 debtors would not result in "undue hardship," and thus, the student loans were nondischargeable. Although the debtors were presently suffering from financial difficulties, their financial position was going to improve in the near future. Their current debt to the credit union would be paid off in January 1995 giving the debtors an additional $210 per month which would more than pay the total monthly obligation of $105 for the three student loans. Moreover, the wife would become employed on a full-time basis which would also increase family income.

Property Settlement - § 523(a)(15)

McGinnis v. McGinnis, 194 B.R. 917 (Bankr. N.D. Ala. April 23, 1996): The debtor's obligation to pay a marital property settlement and for attorney fees was partially nondischargeable under § 523(a)(15). The nondebtor spouse bears the initial burden of establishing that the subject debt arose from the parties' separation or divorce decree, after which the burden shifts to the debtor to demonstrate inability to pay or that the benefit of the discharge would outweigh the detrimental consequences to the nondebtor spouse. Despite the debtor's representation that she had no disposable income, as demonstrated by a modify budget prepared in anticipation of litigation, the debtor had an ability to pay a portion of the debt owed her former spouse. The debtor's original budget, submitted only a few months earlier, indicated that the debtor had disposable income of $351 per month. The decrease in income reflected in the debtor's new budget was not permanent. Also, the debtor admitted that she could reduce certain expenses. Accordingly, the benefit of discharging the debtor's

obligation did not outweigh the detrimental consequences to her former spouse where the former spouse expenses, many of which were fixed, exceeded his income.

Discharge Injunction - § 524

In re Arnold, 206 B.R. 560 (Bankr. N.D. Ala. Mar. 18, 1997): The Court awarded debtor actual damages, attorney fees, and $15,000 in punitive damages against a credit union that willfully and maliciously violated the discharge injunction. The credit union violated the injunction by requiring the debtor to repay his discharged debt in exchange for the credit unions agreement to renegotiation a loan taken by the debtor's wife to finance her education. The credit union was in the process of garnishing the wife's wages. The garnishment would have destroyed her ability to obtain a grant to complete nursing school. The credit union shocked the conscious of the Court by requiring the debtor to include the discharged debt in a new note to stop the garnishment. The debtor's agreement to repay the discharged debt was not "voluntary" within the meaning of § 524(f).

Executory Contracts and Unexpired Leases

***In re* Potomac Sys. Eng'g, Inc., 208 B.R. 561 (Bankr. N.D. Ala. April 18, 1997):** A lessor was entitled to an administrative claim for post-petition rent that accrued during the sixty days subsequent to the entry of the order for relief pursuant to § 365(d)(3) even though the Chapter 7 debtor vacated the leased premises pre-petition. The lessor was not required to show a benefit to the estate to recover its administrative claim under § 365(d)(3). The debtor argued that there was nothing for the trustee to accept or reject under § 365(d)(3) which imposes an affirmative duty upon the trustee to timely accept or reject nonresidential real property leases within sixty days after the entry of the order for relief. Under Virginia law, however, the lessor did not accept the debtor's abandonment of the nonresidential lease. The lessor re-entered the leased premises to dispose of the furniture abandoned by the debtor and to make certain buildout of improvements to re-let the premises for the benefit of the debtor's account. Moreover, the lessor expressly informed the debtor in a letter that it did not accept the abandonment as a surrender of the premises.

Exemptions

***In re* Albright, 214 B.R. 408 (Bankr. N.D. Ala. Nov. 5, 1997):** First Union National Bank moved for relief from the automatic stay to proceed with foreclosure against Chapter 13 debtors' residence due to default in post-petition payments. Debtors consented to the lifting of the stay with regard to the house, but asserted that they were entitled to exempt, as personal

property, two replacement heat pumps purchased after execution of the mortgage. Under Alabama law, the heat pumps were fixtures subject to the after-acquired property provisions of the mortgage. The pumps were attached, even if slightly, to the residence, were integral to the function and purpose of the house, and debtors obviously intended to permanently affix the pumps to their residence. The debtors waived their right to exempt the heat pumps by voluntarily conveying same to the bank pursuant to the terms of the mortgage.

In re Hyde, 200 B.R. 694 (Bankr. N.D. Ala. Sept. 25, 1996): Creditor objected to debtor's claims of exemption of an IRA and two life insurance policies with an aggregate cash value of $2,000. Under Alabama Code §§ 27-14-29 and 6-8-10, the life insurance policies and their aggregate cash surrender value were exempt. The statutes provided that life insurance proceeds are exempt against creditors of the insured and the policy owner. The debtor was the insured and his wife and daughter were the beneficiaries under the life insurance policies. The Court rejected the creditors argument that life insurance proceeds are only exempt against creditors of the beneficiary. The Chapter 7 debtor could also exempt IRA funds under Alabama Code section 19-3-1(b) and in accordance with the case of *In re Harless*, 187 B.R. 719 (Bankr. N.D. Ala. 1995)(J. Stilson).

Smith v. Alabama (*In re* Smith), 176 B.R. 221 (Bankr. N.D. Ala. Jan. 9, 1995): A Chapter 13 debtor could not assert a homestead exemption in property subject to forfeiture based on the debtor's alleged sale of a controlled substance from the premises. Alabama's homestead exemption, which states that the homestead of every resident shall be exempt from levy and sale under execution or other process for the collection of debt, protects a debtor's homestead from execution on contracted debts, but does not protect real estate used in criminal activity.

Judicial Estoppel

***In re* Gandy, Ch. 7 Case No. 98-82409-JAC-7 (Bankr. N.D. Ala. Feb. 23, 2000), *aff'd*, Civil Action No. CV-00-S-1461-NE (D. Ala. Aug. 8, 2000)(Smith, J.):** The debtor was judicially estopped from reopening his case to add an unscheduled asset. The debtor failed to list a discrimination claim against his employer in his bankruptcy petition. The debtor argued that the omission was merely inadvertent, but the Court found the debtor's claim of inadvertence to be inconceivable based upon the facts of the case. Even assuming that the debtor's failure to disclose was inadvertent, the Bankruptcy Code requires full disclosure. The debtor did not comply with this requirement despite having numerous opportunities to disclose his claim during his Chapter 13 case, after conversion, and before filing suit in his own name. Instead, the debtor disclosed the asset only after the defendant moved to dismiss the complaint on the ground that the debtor lacked standing to pursue the lawsuit. Accordingly, the Court found that any benefit of reopening the case was offset by the detriment to the defendant and denied the motion to reopen. The United States District Court for the Northern District of

Alabama affirmed the bankruptcy court's denial of the motion to reopen. The district court concluded the bankruptcy court did not abuse its discretion by refusing to reopen the debtor's bankruptcy case. The district court supported the finding that the debtor was well aware of his claim during the pendency of his bankruptcy case, but intentionally failed to disclose the claim in an apparent attempt to defraud the bankruptcy system and his creditors.

Burks v. Louisiana Board of Regents (*In re* Burks), Ch. 13 Case No. 99-80427-JAC-13, Adv. No. 99-80153-JAC-13, (Bankr. N.D. Ala. Feb. 15, 2000), *aff'd*, Civil Action No. CV-00-S-0885-NE (D. Ala. Aug. 25, 2000)(Smith, J.): The Court denied debtor's motion to alter or amend judgment entered in favor of the creditor on debtor's complaint to determine the dischargeability of a debt under § 523(a)(8). The debtor moved to alter or amend the judgment upon the ground that the confirmation order included language that discharged the balance of the obligation upon completion of plan payments. The Court recognized the line of cases finding that confirmation of a Chapter 13 plan constitutes res judicata where the plan purports to adjudicate dischargeability. The Court disapproved of such practice and cited a recent case in which an Ohio bankruptcy court required the debtor's attorney to show cause why inclusion of the partial discharge provision in the plan did not violate Bankruptcy Rule 9011. Without deciding whether the partial discharge provision constituted res judicata, the Court found that the debtor was judicially estopped from taking an inconsistent position first by seeking to have a portion of the debt discharged through his plan and then by seeking to have the entire debt discharged in the adversary proceeding. On appeal, the district court affirmed the bankruptcy court finding that the debtor's obligation to the Louisiana Board of Regents was a nondischargeable student loan under § 523(a)(8).

Modification

Collier v. Valley Fed. Sav. Bank (*In re* Collier), 198 B.R. 816 (Bankr. N.D. Ala. Aug. 1, 1996): The Chapter 13 debtors' receipt of insurance proceeds after the post-confirmation destruction of their rental property by fire warranted a modification of debtors' confirmed plan. The plan provided for the mortgage to be paid direct with unsecured creditors receiving a 55% dividend. After the insurance proceeds were used to pay off the mortgage in full, an excess of $25,600 remained. The Court modified the plan to increase the dividend to unsecured creditors finding that the insurance proceeds constituted an unexpected and extraordinary change in the debtors' financial circumstances.

Preferences

Anderson-Smith & Assocs., Inc. v. Xyplex, Inc. (*In re* Anderson-Smith & Assocs.,

Inc.), 188 B.R. 679 (Bankr. N.D. Ala. Nov. 17, 1995), *aff'd*, CV-96-N-1675-NE (D., Dec. 11, 1997): A Chapter 11 debtor's preferential payments to a creditor for network system components did not come within the ordinary course of business exception to preference avoidance. The circumstances surrounding the initial arrangement concerning one of the transfers was not in the ordinary course of business for either party. The debtor was pressured into taking delivery of the goods in anticipation of being awarded a government contract. Further, there were unusual debt collection efforts and pressure by the creditor to force the debtor to make the payments, and the payments were late. Finally, the check issued to pay for one of the shipments bounced, and the debtor ultimately paid for the shipment by issuing a replacement check.

While another preferential payment to the creditor, consisting of the debtor's endorsing its customer's check to the creditor, did not come within the ordinary course of business exception, the payment was a contemporaneous exchange for new value. After negotiating the terms of the payment, the creditor extended the debtor new credit, in the amount of $98,224.30 for supplies that were then delivered to the debtor. Thus, the transfer did not result in the diminution of the bankruptcy estate. Further, the creditor and debtor intended the transaction to be a contemporaneous exchange. Finally, the exchange was substantially contemporaneous despite a nine day delay in the extension of the new credit and payment.

Property of the Estate

***In re* 4-R Management, Inc., 208 B.R. 232 (Bankr. N.D. Ala. May 8, 1997):** Under Alabama law, the officers and owners of a closely held corporation had sufficient rights in a debtor-corporation's coin collection, by virtue of their relationship with the corporation and their use and control over the coins, that they were able to grant a security interest in the coins, for the benefit of the corporation, by means of a security agreement which they signed solely in their individual capacities. While one must have an interest in collateral to grant a security interest therein, such interest need not rise to the level of ownership.

Mayhall v. Ford Motor Credit Co. (*In re* Mayhall), 200 B.R. 241 (Bankr. N.D. Ala. Sept. 10, 1996): Chapter 13 debtors had no interest in a leased automobile that the lessor repossessed one day pre-petition upon the debtors' default under the terms of the lease. The debtors attempted to cure the default through their Chapter 13 plan pursuant to § 1322(b)(3) of the Code. However, the lease terminated upon the lessor's lawful repossession according to the terms of the lease. Therefore, the vehicle was not estate property, and the debtors could neither compel its turnover nor assume the lease.

Shepard v. United States (*In re* Potomac Sys. Eng'g, Inc.), 202 B.R. 632 (Bankr. N.D. Ala. Aug. 29, 1996): The Court lacked subject matter jurisdiction in action seeking the return of funds levied and seized by the IRS to the extent that the plaintiffs sought the return of funds that were not property of the estate. Disputes between creditors over non-estate property constitute non-core, unrelated cases over which a bankruptcy court lacks jurisdiction. The

plaintiffs attempted to establish jurisdiction by arguing that the trustee had not abandoned his interest in the property. However, the trustee's failure to abandon his interest in the property could not vest subject matter jurisdiction in the Court where the retained interest was of no value to the bankruptcy estate.

Califf v. Califf, 195 B.R. 499 (Bankr. N.D. Ala. May 10, 1996): The interest of a Chapter 7 debtor's former wife in his military retirement income was sole and separate property, unaffected by debtor's Chapter 7 discharge. The divorce decree awarded the wife 45% of the debtor's military retirement pay by direct allotment. The decree did not explicitly make the interest the wife's sole and separate property. However, under the Federal Uniformed Services Former Spouses Act and the case of *Vaughn v. Vaughn*, 634 S.2d 533 (Ala. 1993), the divorce decree gave the wife a vested legal right to 45% of the debtor's retirement pay. The military retirement obligation was not in the nature of a property settlement, which would allow the debtor to discharge it under § 523(a)(15). Accordingly, the wife's interest was a nondischargeable, proprietary interest, not a mere claim against debtor's estate.

Condor One, Inc. v. Turtle Creek, Ltd. (*In re* Turtle Creek, Ltd.), 194 B.R. 267 (Bankr. N.D. Ala. April 3, 1996): An assignee of the Chapter 11 debtors' mortgages to HUD did not have a perfected interest in the rent generated by the properties. Thus, the rents were estate property. Alabama law rather than federal common law applied because the assignee did not have federal lender status. HUD did, in a supplemental assignment, purportedly assign its regulatory agreement rights to the assignee. However, that assignment could not convey federal lender status to the assignee because HUD had previously relieved the debtors from its regulatory agreement. Under Alabama law, the assignee's recordation of the mortgage was insufficient to perfect the assignments. Instead, the assignee needed to take an additional step such as foreclosure, sequestration of rents, or appointment of a receiver to perfect its interest.

Reopening

In re James, 184 B.R. 147 (Bankr. N.D. Ala. July 6, 1995): Chapter 7 debtors were not entitled to reopen their case to add an omitted pre-petition judgment creditor. In a typical Chapter 7 no asset case, the debtor's failure to list a creditor does not, in and of itself, make the creditor's claim nondischargeable. The creditor is not prejudiced by the debtor's failure to list creditor's claim in the case because the creditor would not have received a distribution even if the debtor had properly scheduled the creditor's claim. Instead, the parties have a number of remedies available to litigate the dischargeability of the debt after the case is closed, including: (1) the creditor can pursue a lawsuit on the claim against the debtor while the debtor can assert the bankruptcy discharge as an affirmative defense; (2) either party can move to reopen the case to file an adversary proceeding to determine the dischargeability of the debt; or (3) the debtor can file an action to enforce the discharge injunction.

Res Judicata

SouthTrust Bank v. WCI Outdoor Products (*In re* Huntsville Small Engines, Inc.), 228 B.R. 9 (Bankr. N.D. Ala. Dec. 9, 1998): A general retention clause in a confirmed Chapter 11 plan, reserving the debtor's right to pursue, postconfirmation, all prepetition causes of action belonging to the debtor, was ineffective to preserve the debtor's right to pursue preference claims against a trade creditor for repossessing inventory during the insider preference period. The language in the debtor's statement of financial affairs regarding the creditor's repossession of inventory was insufficient to prevent the application of res judicata to bar subsequent preference proceedings where such claims were not specifically disclosed in the debtor's plan or disclosure statement.

Marlow v. Sweet Antiques *et al*. (*In re* Marlow), 216 B.R. 975 (Bankr. N.D. Ala. Jan. 27, 1998): Chapter 13 debtor commenced post-confirmation adversary proceeding to void, as alleged preferential transfer, recorded judgment lien of creditor. Prior to the expiration of the non-governmental creditors bar date, the creditor filed a proof of claim in debtor's Chapter 13 case as a secured creditor. Post-confirmation, the debtor had 20 days after the date of the order allowing claims within which to file an objection to claim. The time for objecting to claims having expired, the debtor filed an adversary proceeding pursuant to § 547 and objected to the claim of creditor as being a voidable preference. Creditor argued that the res judicata effect of the confirmation order and the order allowing claims barred debtor from attacking the validity of its claim. Although the debtor filed the action within the statute of limitations prescribed by § 546(a), the Court determined that the debtor's confirmed plan and the order allowing claims were res judicata as to all justiciable issues which should have been raised prior to confirmation and reserved by debtor's confirmed plan.

Sale or Assignment of Property

Thompson v. Yuan (*In re* Yuan), 178 B.R. 273 (Bankr. N.D. Ala. Feb. 10, 1995): The purchasers of real property from a Chapter 7 debtor's wife were bona fide purchasers, and the bank that financed the purchase was a mortgagee without notice. Thus, a judgment creditor alleging that the property had been fraudulently conveyed by the debtor to his wife could not add the purchasers or the bank as defendants in a proceeding to recover from the debtor. Under Alabama's lis pendens statute, the creditor's motion to execute on the judgment, which was recorded in the name of the debtor, was insufficient notice of the proceeding to recover property titled in name of the debtor's wife. Further, the purchasers and the bank had no actual notice that there was any pending proceeding concerning the property.

Sanctions

Matter of Smith, 257 B.R. 344 (Bankr. N.D. Ala. Jan. 17, 2001): Debtor's attorney disgorged fees in the amount of $2,800 and paid $10,000 into the bankruptcy estate as a fine for filing a Chapter 13 bankruptcy petition as an abusive litigation tactic. Counsel for debtor filed the bankruptcy petition 23 hours prior to a summary judgment setting in state court on a complaint to which the debtor admittedly had no viable defenses. Due to the timing of the petition, the debtor was able to effectuate the transfer of his only asset, a one-half interest in his mother's probate estate, that would have otherwise been subject to the bank's judgment lien. After the debtor successfully delayed the summary judgment hearing in state court, he moved to voluntarily dismiss his petition. The bank objected and sought to have the case converted to Chapter 7. The debtor argued that his case could not be converted because he was a farmer and sought instead to have the case dismissed so that he could deal with current debts from his farming operation in a subsequent Chapter 13. It was obvious to the Court that the automatic stay was invoked as a litigation tactic in the state court action instead of as a shield to give the debtor time to reorganize while treating his creditors fairly and that debtor's counsel was engaging in gamesmanship with the bank. The Court accepted counsel's voluntary surrender of his attorney fees and the $10,000 sanction, but warned counsel that any further sanctionable conduct would result in the suspension of his practice in this court.

In re Kelley, 255 B.R. 783 (Bankr. N.D. Ala. Nov. 20, 2000): The Court denied debtor's claim of exemption to the proceeds of a judgment in debtor's favor as having been claimed in bad faith and warned debtor's counsel that his conduct in failing to investigate and disclose the true value of the judgment appeared to be sanctionable under Rule 9011(b) and § 105(a). Prior to filing the petition, the debtor informed his attorney that he had a judgment arising out of an automobile accident which apparently had some value but the debtor did not know the exact dollar amount. Rather than asking the debtor some very fundamental questions such as who?, what?, where?, when?, how?, and why?, the attorney simply listed the judgment as an asset in Schedule B of debtor's petition and claimed the judgment as exempt in Schedule C in the amount of $1. The debtor's attorney could have easily discovered the value of the judgment if he had investigated the facts surrounding the judgment either prior to filing the petition or at least within a reasonable time after filing the petition. Instead, the matter was brought before the Court on trustee's objection to the debtor's claim of exemption. The Court did not impose sanctions on debtor's counsel, but warned counsel that his conduct in failing to investigate appeared to be sanctionable under Bankruptcy Rule 9011 and § 105(a).

Tolling

United States v. Fontes (*In re* Fontes), 228 B.R. 3 (Bankr. N.D. Ala. Dec. 17, 1998): The Court exercised its § 105 powers to equitably toll the three-year "look back" period during which the debtor could not file bankruptcy and obtain a discharge of his income tax debt with respect to which a tax return was last due three years before the filing date of debtor's petition. The three-year look back period in § 507(a)(8)(A)(i) is a substantive element of the §

523(a)(1)(A) cause of action that can be supplied using equitable principles only upon proof of substantial debtor misconduct or abuse.

United States v. Fontes (*In re* Fontes), 228 B.R. 1 (Bankr. N.D. Ala. Sept. 25, 1998): The three-year look back period, during which a debtor cannot file bankruptcy and obtain discharge of income tax debt with respect to which a tax return was last due three or less years earlier, was not statutorily tolled during the time when the IRS was barred from collecting taxes during debtor's prior bankruptcies. The look back period is not a statute of limitations but rather a substantive element of the nondischargeability cause of action that is subject to equitable tolling pursuant to § 105 upon proof of substantial debtor misconduct. Such misconduct is not subject to determination on summary judgment.